judgments were not supported by a valid debt and that the judgments were irregularly obtained. I agree with the two Australian decisions referred to above.

Mr Siew cited another Australian case, *Transfloors Pty Ltd* v *SWF Hoists & Industrial Equipment Pty Ltd*[6] in support of his argument that a company which had obtained judgment cannot be restrained from proceeding with a winding-up petition. In that case, Vasta J of the Supreme Court of Queensland refused to grant an order for injunction to restrain from issuing a petition for the winding up of the applicant. The learned judge also refused to go behind the judgment. But it should be noted that in that case, judgment was obtained after a lengthy hearing on the merits. I do not think I can rely on Vasta J's decision because in the present case we are concerned with a judgment entered in default of appearance.

Applying the principles laid down in *Re Derrygariff*[4] and *Re Gasbourne*[5] to the present case, the first question to consider is whether the judgment obtained in default of appearance against the plaintiff is a regular judgment or whether the judgment was obtained by fraud or collusion. If there is allegation that the judgment was obtained irregularly or obtained by fraud or collusion, the court has the discretion to go behind the judgment.

In the present case, the plaintiff has not alleged that the judgment obtained in default of appearance is an irregular judgment. The defendant company, in its affidavit affirmed on 31 January 1989, averred that the judgment was a regular judgment. The defendant further averred that the writ of summons and statement of claim were served on the plaintiff by way of prepaid AR Registered post on 7 May 1988 and that the plaintiff's solicitors accepted service of same by acknowledging and returning the AR card. The AR card, which was exhibited to the affidavit, shows that service of the writ was accepted by Francis Lim & Co, who are solicitors acting for the plaintiff.

In my opinion, the judgment in default of appearance is a regular judgment. There is therefore a judgment debt and the defendant is a creditor as envisaged in s 217 of the Companies Act 1965. The plaintiff's contention that the debt is disputed has no basis at all. In the circumstances, the defendant should not be restrained from proceeding with the winding-up petition. See the *Chip Yew Brick Works* case[2] at p 448.

I should add here that there is no evidence in the present case to show that the defendant had filed the winding-up petition merely to put pressure on the plaintiff to pay the debt. It appears to me that this is a genuine case of a winding-up petition and there is no evidence to indicate that the petition is an abuse of the process of the court.

For the reasons stated above, I dismiss the application with costs.

Application dismissed.

Solicitors: *Francis Lim & Co; Raja Eleena Siew, Ang & Tan.*

Reported by *PS Ranjan*

Yamamori (Hong Kong) Ltd v Davidson & Ors

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K524 OF 1988
MOHAMAD NOOR J
9 NOVEMBER 1989

Companies and Corporations — Shares — Transfer — Validity of — Locus standi to challenge validity of share transfer

Evidence — Formal proof — Whether share certificate needs to be formally proved — Share certificate as prima facie evidence of title — Companies Act 1965, s 100

Hiew Fook Realty (Plantations) Sdn Bhd ('HFP') is a wholly-owned subsidiary of Hiew Fook Realty (Holdings) Sdn Bhd ('HFR') and Borneo Hotel Sdn Bhd ('BHSB') is a wholly-owned subsidiary of HFP. Pursuant to an order of court, an extraordinary general meeting of BHSB was held on 14 March 1988. At this meeting, the old directors were removed and replaced by the first and second defendants. The third defendant was subsequently appointed as an additional director. The plaintiffs challenged, inter alia, their status as directors of BHSB. They contended that by reason of the transfer of the whole of BHSB shares to itself by the then directors of HFP on 29 October 1985, BHSB is a wholly-owned subsidiary of the plaintiffs who have complete domain over the said shares. A share certificate was produced in support thereof. The defendants disputed this. The plaintiffs raised a preliminary issue as to whether the defendants themselves can now challenge the validity of the alleged transfer of shares.

Held, allowing the plaintiffs' preliminary objection:

(1) It is obvious that the share certificate bears the common seal of the company BHSB and the signatures of its then directors and the stamping mark dated 29 October 1985 appeared therein. On these facts, presumption of regularity may be applied to it. As ownership of shares is pleaded, it is open to the court to look at the said certificate without the necessity of formal proof. Therefore, by virtue of s 100 of the Companies Act 1965, the said certificate is accepted as prima facie evidence of the title of the plaintiffs to the shares.

(2) It is necessary for the defendants to have an interest in BHSB in order to maintain their defences relating to their challenge on the validity of the alleged share transfer.

(3) As the defendants are not shareholders of BHSB, they are strangers so far as BHSB and the plaintiffs are concerned. Hence, they lacked the legal capacity to attack the validity of the share certificate.

(4) Further, assuming that the defendants' stand as shareholders of HFP, they have no right, legal or equitable, to the property of HFP. As HFP owned the said BHSB shares, HFP is the proper person to complain.

Cases referred to

1 *Day* v *William Hill* [1949] 1 All ER 219 (refd)
2 *Bhikku Daeng* v *Maung Shwe Tyn* [1980] 2 MLJ 184 (refd)
3 *Chik bte Abdullah* v *Itam bte Saad* [1974] 1 MLJ 221 (refd)
4 *Macaura* v *Northern Assurance Co* [1925] AC 619 (refd)
5 *Yeng Hing Enterprises* v *Liow Su Fah* [1979] 2 MLJ 240 (refd)
6 *Prudential Assurance* v *Newman Industries (No 2)* [1982] 1 All ER 354 (refd)

Legislation referred to

Companies Act 1965 ss 5, 100

R Sethu (*Peter Soong* with him) for the plaintiffs.
Noel Kenneth Davidson (*A Decena* and *Nobert Yapp* with him) for the defendants.

Cur Adv Vult

Mohamad Noor J: In this action, the plaintiffs claim against the defendants, inter alia, the following:

(1) a declaration that the extraordinary general meeting of Borneo Hotel Sdn Bhd (hereinafter referred to as 'BHSB') held on 14 March 1988 is invalid, null and void and of no effect;
(2) a declaration that the appointment of the first, second and third defendants as company directors of BHSB is invalid, null and void and of no effect;
(3) a declaration that Datuk Hiew Min Yong, Hiew Min Hand and Hiew Min Hoi are and continue to be the lawful company directors of BHSB;
(4) an injunction to restrain the first, second and third defendants by themselves or by their servants or agents or otherwise from acting or continue to act in any manner and howsoever as company directors of BHSB;
(5) an injunction to restrain the fourth defendant by themselves or by their servants or agents or otherwise from taking instructions or continue to take instructions from the first, second and third defendants as company directors of BHSB on all matters whatsoever and restrain them from selling by tender or otherwise or deal with in any manner the property of BHSB known as The Borneo Hotel erected on Kota Kinabalu Town Lease No 015106251.

Briefly, the undisputed facts are as follows. The plaintiffs are incorporated as a company in the British colony of Hong Kong. The first defendant, a partner in the fourth defendants was appointed receiver of Hiew Fook Realty (Holdings) Sdn Bhd (hereinafter referred to as 'HFR') pursuant to a series of debentures issued by HFR in favour of the Standard Chartered Bank (hereinafter referred to as 'the bank') to secure banking facilities. Hiew Fook Realty Plantations Sdn Bhd (hereinafter referred to as 'HFP') is a wholly-owned subsidiary of HFR and BHSB is a wholly-owned subsidiary of HFP and by virtue of the provisions of s 5 of the Companies Act 1965, BHSB is a subsidiary of HFR. That being the case, the BHSB shares, the crux of the dispute, are the assets of HFR which form part of the first floating charge created by HFR in favour of the bank.

Pursuant to an order of court, an extraordinary general meeting of BHSB was called for the purpose of removing the then board of directors and replacing them with the first defendant's nominees. At the said meeting on 14 March 1988, the old directors (including Datuk Hiew Min Yong) were removed and replaced by the first and second defendants. The third defendant was subsequently appointed as an additional director. The second and third defendants are also partners in the fourth defendants. The total number of shares issued by BHSB is 11,200,000 ordinary shares of $1 each. That represents its total paid-up share capital.

The plaintiffs contend that by reason of the transfer of the whole BHSB shares to itself by the then directors of HFP on 29 October 1985, BHSB is a wholly-owned subsidiary of the plaintiffs who have complete domain over the said shares. The share certificate was produced in support thereof (per exh SEB-1 as exhibited in the affidavit of Susan Elizabeth Beach affirmed on 21 October 1988 for the purpose of the interlocutory application). However, the defendants dispute this, contending that according to the record of the statutory books of BHSB at the time when the first defendant was appointed receiver the alleged transfer of share never took place.

At the commencement of the trial, the plaintiffs' counsel raised a preliminary issue as to whether the defendants by themselves can now challenge the validity of the alleged transfer of shares.

In this action, the plaintiffs had selected the said defendants and challenged their status as directors of BHSB and that the said defendants are defending the validity of their appointments. It is true that the said defendants can defend the validity of their appointments and there is no authority to say otherwise. And, as contended by the defendants' counsel, since para 2(f) of the statement of defence had been withdrawn, only the validity of the said defendants' appointment is in issue. However, it is without doubt that the said defendants, in defending their appointments seek, in effect, to challenge the validity of the alleged transfer of shares to the plaintiffs. Therefore, the issue for my consideration is whether the said defendants by themselves can do so now in the present form of action.

It is necessary to determine first whether the impugned share certificate (exh SEB-1) should be accepted as prima facie evidence of the title of the plaintiffs to the shares without formal proof. It is obvious that the said

certificate bears the common seal of the company (BHSB) and the signatures of its then directors and the stamping mark dated 29 October 1985 appear therein. On these facts, presumption of regularity may be applied to it. For the aforesaid reasons, it is my view that the said certificates need not be formally proved further. And, as ownership of the said shares is pleaded in para 2 of the statement of claim, on the authority of *Day* v *William Hill*,[1] it is open to the court to look at the said certificate without the necessity of formal proof. Therefore, by virtue of the provision of s 100 of the Companies Act 1965, the said certificate is accepted as prima facie evidence of the title of the plaintiffs to the shares.

That being the case, it is necessary for the said defendants to have an interest in BHSB in order to maintain their defences relating to their challenge on the validity of the alleged share transfer (*Bhikku Daeng* v *Maung Shwe Tyn*[2] and *Chik bte Abdullah* v *Itam bte Saad*[3]). As the said defendants are not the shareholders of BHSB, they are strangers so far as BHSB and the plaintiffs are concerned. Hence, they lack the legal capacity to attack the validity of the share certificate. Further, the shares in BHSB until the alleged transfer was the property of HFP. Assuming that the said defendants' stand as shareholders of HFP, they have no right, legal or equitable, to the property of HFP (*Macaura* v *Northern Assurance Co*[4] and *Yeng Hing Enterprises* v *Liow Su Fah*[5]). Hence, they cannot complain against the alleged transfer of the shares which was then the property of HFP. As HFP owned the said shares (in BHSB), HFP is the proper person to complain (Walter Woon, *Company Law*, pp 225-226 and *Prudential Assurance* v *Newman Industries (No 2)*[6]).

In the final analysis, I conclude that the said defendants are incompetent to challenge the validity of the alleged transfer as raised in their defence, ie they do not have the locus standi to maintain their defence in its present form. The said defendants as directors of BHSB cannot dispute the plaintiffs' right as shareholder. Only the shareholders of BHSB, ie HFP can do so, in which case HFP should have been brought in as a party. Therefore, the preliminary objection is hereby sustained.

Order accordingly.

Solicitors: *Lawrence Chai & Peter Soong; Jayasuriya Kah & Co.*

Reported by *Shaun Chan*

Re Ling Yew Huat & Anor

HIGH COURT (SIBU) — CRIMINAL REVISION NO 5 OF 1989
CHONG SIEW FAI J
14 NOVEMBER 1989

Criminal Procedure — Bail — Showing cause why bail bond should not be forfeited — Principles to be applied

Two sureties, Ling Yew Huat and Lau Yioh Hie, stood bail for an accused person, Ling Yew Mee, who was released on bail in the sum of $8,000 in two sureties. The accused failed to appear in court and the sureties were ordered by the sessions court to pay a penalty of $12,000 ($8,000 by Ling and $4,000 by Lau).

Held, quashing the order of the sessions court:

(1) When an accused fails to appear, before ordering payment of a penalty, the court should consider if sufficient cause has been shown and if not, whether the circumstances are such that the whole sum should be enforced. The power to impose a penalty should be exercised judiciously.

(2) The order of payment of $12,000 clearly exceeded the amount fixed in the bail bond of $8,000 in two sureties and was erroneous.

(3) The burden of satisfying the court of relief against full penalty or that the full sum should not be imposed lies with the surety.

(4) Lau had reminded the accused to go to court and upon his failure to attend, had informed him again to go to court. Sufficient cause had therefore been shown against imposition of any penalty.

(5) Ling had only attended court once and had not shown that he made any attempts to ensure the accused's attendance. He was therefore ordered to pay a penalty of $4,000.

Cases referred to
1 *Valliamai* v *PP* [1962] MLJ 280 (folld)
2 *Ramlee & Anor* v *PP* [1969] 1 MLJ 42 (folld)

Legislation referred to
Criminal Procedure Code (FMS Cap 6) s 404(v)

Abdul Rahman bin Sebeli (Deputy Public Prosecutor) for the respondent.
Wong Sin Nang for the applicants.

Cur Adv Vult

Chong Siew Fai J: In Criminal Case No SSC/1/87, the accused was released 'on bail in the sum of $8,000 in two sureties ...'. The two sureties, Ling Yew Huat and Lau Yioh Hie, entered into a bail bond in which they bound themselves jointly and severally to forfeit the sum of $8,000 in the event of the accused failing to appear in court.

The accused having failed to turn up in court on the adjourned date, 17 April 1989, notices were issued to the sureties to show cause why the sum should not be paid. In the result, the learned sessions court judge ordered a total